

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

ADDITION OF EVERY DOOR DIRECT MAIL –
RETAIL TO THE PRODUCT LIST

Docket No. MC2012-31

RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
DAVID B. POPKIN MOTION
(July 27, 2012)

On July 26, 2012, David B. Popkin (“Mr. Popkin”) moved for leave to respond to the Postal Service’s response to his request for a Presiding Officer’s Information Request (Popkin Motion). Mr. Popkin’s says a response is needed to correct a “material misrepresentation of the Commission’s rules in the Postal Service’s Opposition.” But there is no material misrepresentation. The Postal Service therefore opposes Mr. Popkin’s motion.

Background

On July 19, 2012, the Commission received the Request of Mr. David B. Popkin for a Presiding Officer’s Information Request (“Request”).¹ The Request asked that the Presiding Officer order the Postal Service to respond to six questions concerning his Request in this docket, filed on July 10, 2012. On July 24, 2012 the Postal Service filed its Opposition to the Request.²

¹ Docket No. MC2012-31, Request of David B. Popkin for a Presiding Officer’s Information Request (July 19, 2012).

² Docket No. MC2012-31, Opposition of the United States Postal Service to Mr. David B. Popkin’s Request for a Presiding Officer’s Information Request (“Postal Service Opposition”) (July 24, 2012).

In its Opposition, the Postal Service argued, in part, that the Request was not consistent with the rules applicable to mail classification dockets under 39 C.F.R. § 3020.30 *et seq.* These rules limit public participation to comments provided during a public comment period.³ In support of its position, the Postal Service noted that, unlike the rules under 39 C.F.R. § 3020.30 *et seq.*, the rules applicable to exigent rate cases specifically permit participants to submit proposed questions to the Commission.⁴ Using, among other things, this distinction in the construction of the Commission's rules, the Postal Service reasonably concluded that the Commission did not intend for participants to submit questions to the Commission in mail classification dockets.⁵ On July 26, 2012, Mr. Popkin filed his response to the Postal Service's Opposition.⁶

Argument

First, the Postal Service categorically denies Mr. Popkin's accusation that it has materially misrepresented the Commission's rules. This is a serious allegation that the Postal Service does not take lightly. The Postal Service offered a reasonable interpretation of the procedures applicable to mail classification dockets. While Mr. Popkin may disagree with the Postal Service's interpretation, it does not give him license to accuse the Postal Service of deliberately misrepresenting the law. Moreover, as discussed in more detail below, the rule cited by Mr. Popkin does not apply in the present situation.

In his Response, filed concurrently with his Motion, Mr. Popkin repeats his unwarranted allegation of misrepresentation, and directs the Commission's attention to

³ See 39 C.F.R. §§ 3020.33(e) and 3020.34.

⁴ Postal Service Opposition, *supra* note 2, at 3 (citing 39 C.F.R. § 3010.65(c)).

⁵ *Id.* at 3.

⁶ Docket No. MC2012-31, David B. Popkin Response to the United States Postal Service Opposition to My Request for a Presiding Officer Information Request ("Popkin Response") (July 26, 2012)..

39 C.F.R. § 3007.3(c).⁷ In pertinent part, this rule states that “[a]ny person may request that the Commission issue a data or information request by filing a motion with the Commission, pursuant to §3001.31 of this chapter...” Mr. Popkin asserts that this rule permits individuals to file motions requesting that information requests be issued.⁸ Unfortunately, Mr. Popkin’s interpretation is misguided.

First, it is important to note that §3007.3(c) does not appear under the rules applicable to mail classification dockets (39 C.F.R. § 3020.30 *et seq.*), but appears instead in Part 3007 – Treatment of Non-Public Materials Provided by the Postal Service. If, as Mr. Popkin appears to believe, §3007.3(c) permits any participant, in any proceeding, under any circumstances, to submit proposed questions to the Commission, then its placement in Part 3007 is peculiar. Fundamental tenets of statutory interpretation demand that a rule be read in the context within which it appears. Had the Commission intended this rule to be one of general applicability, it could have easily placed it under Part 3001, Subpart A – Rules of General Applicability. Indeed, the Commission’s own interpretation of §3007.3(c) indicates that it did not intend for this rule to apply as broadly as Mr. Popkin implies. In Order No. 194 (Docket No. RM2008-1), the Commission noted that the proposed rules under §3007.3:

only allow for persons to request access to materials or disclosure of materials after the materials have been filed with the Commission. This rule provides a mechanism for relevant materials to be filed with the Commission concurrent or prior to a request for access (under proposed rules 3007.40 or 50) [pertaining to requests for access to non-public information] or early termination of non-public status (under proposed rule 3007.31) [pertaining to requests for early termination of non-public status]. In justifying a request made pursuant to this rule, the movant should indicate whether it expects a request under proposed rule 3007.31, 3007.40, or 3007.50 will be made and a detailed statement of support

⁷ *Id.*

⁸ *Id.*

explaining how the materials sought will be relevant and material to the Commission's duties under title 39.⁹

This statement clearly indicates that the Commission intended this rule to apply only in instances where participants were seeking relevant materials related to non-public information submitted by the Postal Service. Without this rule, the public would lack a procedural mechanism for encouraging the Commission to examine materials, or seek information to which only the Commission has access. The Postal Service has not provided any non-public documents in this docket, nor has Mr. Popkin requested access to any non-public information. In fact, Mr. Popkin merely requests responses to questions that concern the Postal Service's Request to add EDDM-R to the Mail Classification Schedule, a public document.

Moreover, the Postal Service's interpretation conforms to the general construction of the Commission's rules, which specifically permit participants to submit questions to the Commission in other proceedings.¹⁰ If Mr. Popkin's interpretation of §3007.3(c) were correct, the existence of such procedures would appear to be superfluous. The Postal Service does not believe that the Commission would be so casual in the construction of its procedural rules. Consequently, the Postal Service does not accept that §3007.3(c) provides Mr. Popkin with the procedural authority, having not sought information about non-public materials, to submit questions to the Commission in a mail classification docket.

⁹ Docket No. RM2008-1, Order No. 194: Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, at 22-23 ("Order No. 194") (March 20, 2009). Additionally, it is important to note that the text of the proposed rule did not materially change in the final rule. *Compare* §3007.3(b) in Order No. 194, at 34 *with* §3007.3(c) in Docket No. RM2008-1, Order 225: Final Rule Establishing Appropriate Confidentiality Procedures, at 22 (June 19, 2009)..

¹⁰ See 39 C.F.R. § 3010.65(c).

Finally, it is important to keep these issues in perspective. The Postal Service has not argued, and is not arguing, that Mr. Popkin should not be able to present his concerns to the Commission. Rather, the Postal Service is simply trying to ensure that participants in mail classification dockets comply with the applicable rules. Indeed, in keeping with the procedural rules applicable to mail classification dockets, the Postal Service invited Mr. Popkin to submit his concerns as comments.¹¹ This would permit the Postal Service to respond to his concerns in its reply comments, and for the Commission to consider issuing a Chairman's Information Request.¹²

Were the Commission to permit Mr. Popkin to submit questions under the theory presented by the PR, mail classification dockets could quickly evolve into complicated, extended, and adversarial proceedings of the kind sought to be avoided in both the PAEA and the Commission's rules. Individuals opposed to the Postal Service's request could flood the docket with proposed questions, unnecessarily complicating these proceedings. It does not take an oracle to imagine what the present docket would look like if every individual commenter were permitted to submit questions to the Commission. Instead, as the rules already provide, and as the Postal Service believes the Commission intended, the most efficient way for participants in mail classification dockets to present their concerns is by submitting comments.

¹¹ Postal Service Opposition, *supra* note 2 at 3.

¹² This approach worked satisfactorily in Docket No. MT2011-3 (Market Test of Experimental Product—Marketing Mail Made Easy [Now Every Door Direct Mail]). In that docket, the Postal Service's Reply Comments responded to questions and concerns raised by the Public Representative and Valpak Direct Marketing Systems, Inc. and Valpak Dealer's Association, Inc. in their comments and earlier requests that the Commission issue an information request. The Commission did not issue an Information Request, but instead noted that the Postal Service's Reply Comments responded to the participants' questions and concerns. Order No. 687 at 3 (March 1, 2011).

Conclusion

For the foregoing reasons, the Postal Service opposes Mr. Popkin's Motion and reiterates its request that the Commission deny Mr. Popkin's Request.

Respectfully submitted,

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July 27, 2012